

IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 10/2021

IND. 25/2020

BC#0009/2020

BETWEEN:

AM

Applicant

- and -

Her Majesty the Queen

Respondent

BEFORE:

The Rt. Hon Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Hon. Sir Michael Birt, Justice of Appeal

Date of Hearing: 6 May 2022

Appearances: Applicant, in person.
Mr. Greg Walcolm, Office of the DPP for the Respondent

JUDGMENT

Transcript of oral judgment dated 6 May 2022 and Approved for Release 10 June 2022

Goldring J, President

1. On the 24th of June 2021, the Applicant was sentenced by Acting Justice Chapple to 11 years and 3 months' imprisonment on each count concurrently, after pleading guilty to two counts of rape, contrary to s.127 of the Penal Code (2019 Revision). A Sexual Harm Prevention Order was also imposed by the court for 7 years.

2. The Applicant now applies for an extension of time in which to appeal against sentence. He represents himself and has done so with no small amount of skill. In his grounds of appeal, his fundamental submission was that he was not given any credit for his plea of guilty. As will shortly become apparent, his submissions went wider than that.
3. The facts are summarised in Mr. Walcolm's helpful submissions, Mr Walcolm appearing as Crown counsel both below and before us.
4. AW and the Applicant knew each other at the time of the offence. AW was 19, the Applicant, 24. On Friday 27th of March 2020, at around three o'clock in the afternoon, AW went to a friend's house in Cayman Brac. She met her friend and some other people. They socialised. Whilst there, the Applicant came. He was rowdy and behaved unacceptably. He was asked to leave and did so. He went to the nearby premises of his older brother. About two hours later, at shortly before nine o'clock, as AW was walking home, she heard somebody speak to her. She turned round and saw the Applicant standing across the street. He ran to her. He asked her the time. She reached into the back pocket of her shorts and once she had pulled out her mobile phone the Applicant snatched it from her and put it in his pocket. He then grabbed her by the throat and pushed her towards the darker beach area by the roadway. He pushed her to the ground. He threatened her, saying that she must do what he asked or harm would come to her. She agreed out of fear. At the Applicant's request, AM took off her shorts and underwear. The Applicant penetrated her vagina with his fingers and penis. He performed oral sex while holding her to the ground. He forced her to bend over backwards. He penetrated her anus with his fingers and penis. He didn't use a condom. He ejaculated in her anus.
5. Throughout the ordeal, the victim tried physically to resist the Applicant, but he would overpower her.
6. Once the Applicant had ejaculated, he told the AM he could not find his slipper or her cell phone.

7. AW's clothes were covered in fecal matter. The Applicant told her to follow him to a public bathroom nearby. He held her hand as they walked. She managed to get her hand free and ran from him, screaming. The Applicant chased her for a while, but she ran to a nearby house. He stopped chasing her and ran away. She immediately complained to the occupants of the house. Unsurprisingly, she was distressed and crying. There was bruising on her body which she had sustained during the events.
8. She called her mother. She told her she'd been raped. Shortly thereafter the police arrived, having been called.
9. As to her injuries, there were bruises and minor lacerations to her knees and general leg area, as well as sand and gravel markings. There was a cut on the inside of her lip. There were no significant injuries to her genitalia. There was a small amount of blood on her anus. Her underwear and cell phone and the Applicant's slippers were recovered from the area of the sea.
10. The Applicant was interviewed twice. He asserted that he and AW were in a relationship. On the night of the incident he said they had had consensual sexual intercourse: that this was the first time that they had had sex.
11. In his typically lucid sentencing remarks, Acting Justice Chapple set out how he arrived at the sentence he did. He considered the Impact Report "*from which it is clear that these offences unsurprisingly have had a profound effect upon her*". He said there was no dispute but that she had suffered serious psychological harm beyond that inherent in the offence of rape. She thought she was going to be killed. He said this at paragraph 11 of his sentencing remarks:

"There are additional aggravating features:

- A. *The defendant subjected the victim to both vaginal and anal rape;*
- B. *He did not wear a condom;*

C. *He ejaculated in her anus.*"

12. It was agreed that these were Category 2/B offences under what were then the recently published Cayman Islands Sentencing Guidelines for sexual offences. They had a starting point of 15 years' imprisonment, with a range of 10 to 19 years following a trial.
13. The judge referred to the Applicant's undoubted mental health problems. He referred, among other things, to the Applicant being on anti-psychotic medication. At paragraph 25 of his sentencing remarks, the judge said this:

"From the information available to me it is impossible to say with any certainty whether — and if so, to what extent — the defendant's culpability for these offences was reduced by...his mental health problems, although it seems to me likely that those problems, in all likelihood exacerbated by drink and/or illicit drugs, contributed to his actions."

14. The judge referred to the several reports that he had before him. The judge concluded that the Applicant presented a high risk of harm to the public.
15. Although the Applicant ultimately pleaded guilty, he did not do so at the first opportunity. He had, of course, alleged consensual intercourse in his interviews. The judge set out the position and his views regarding the plea of guilty at paragraphs 29 and 30 of his judgment:

"The defendant initially pleaded not guilty to these offences and the case was fixed for trial. After the jury was empaneled on 27th of July 2020, as result of something said by the defendant, proceedings were adjourned. Thereafter, on 4th of August he changed his pleas to 'guilty' on counts 1 and 2. Those pleas were accepted by the Crown Subsequently, the defendant indicated that he wanted to vacate his guilty pleas. Legal representation was changed for that application to be pursued.

Following further instructions, Mr Grimwood told the court that the application to vacate pleas was not to be pursued. "Had all other things

been equal, the defendant would have all but exhausted any credit for pleading guilty.” However, Mr Walcolm suggests that in the particular circumstances of this case, a reduction in sentence of 25% would be appropriate, recognising [AM]’s mental condition, and, therefore, his questionable ability to process the proceedings, may well have accounted for these vacillations. That is what I propose to do. His guilty pleas have saved [AW] of having to relive her ordeal by giving evidence before a jury. I also bear in mind the expressions of remorse [AM] conveyed to me this afternoon through Mr Grimwood. I do take his pleas of guilty as an expression of the contrition he now feels for his behaviour.”

16. The judge went onto say:

"The aggravating features I mentioned above, and particularly the fact that here there was both vaginal and anal penetration, justify an appreciable increase in the 15-year starting point suggested by the sentencing guidelines. The defendant's mental health, and the likely reduced culpability on that account, justify a reduction from that increased starting point. In the end, I conclude that the correct starting point is a sentence of 15 years' imprisonment. I then reduce that sentence by 25% to reflect the defendant's guilty pleas, resulting in a sentence of 11 years' and 3 months' imprisonment. That is the sentence upon both count 1 and 2. Those sentences will run concurrently."

17. As we have indicated, in his grounds of appeal the Applicant's submission was that inadequate reduction was given for the plea of guilty. As that part of the judge's observations which we have just cited makes clear, that submission is simply untenable.

18. In his submissions to us, the Applicant has made a number of further points. We summarise.

19. He speaks of his remorse. He speaks of wishing to return to the community something to make up for what he describes as his "*mistake*". He refers to the fact that AW says she has forgiven him. He speaks of his difficulties in prison and of a wish to return to Canada and earn a living. He says he has learned his lesson and, in short, seeks mercy and understanding.
20. It seems to us that the judge was plainly entitled to impose the sentences he did. This was a double rape with profound psychological consequences for AW. Indeed, the judge could not have been criticised had he imposed a higher starting point than the fifteen years which he ultimately took.
21. In the circumstances, carefully as we have listened to AM submissions, it is impossible to grant this application for leave to appeal sentence. In the circumstances, we decline to extend time as AM has requested. This application is refused.